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THE DIRECTOR OF CENTRAL INTELLIGENCE

WASHINGTON, D. C. 20505

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Office of Legislative Counsel

7 June 1978

Honorable Charles M. Mathias, Jr.
United States Senate
Washington, D.C. 20510

Dear Senator Mathias:

As we discussed yesterday evening, with regard to the Civil Service Reform Bill (S. 2640) and related legislation on Federal employee whistle-blowing, here are two short papers addressing the special concerns of intelligence agencies. The views reflected in these papers are in accord with the positions recommended by the Administration, through the Civil Service Commission, for example, in the 22 May 1978 letter to Chairman Ribicoff from Civil Service Commission Chairman Campbell.

Please do not hesitate to contact me if you have further questions or desire additional information. Thank you very much for your interest.

Sincerely,

STAT

Acting Legislative Counsel

Enclosures

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CIVIL SERVICE REFORM BILL AND THE NEED FOR CIA EXEMPTION

1. The unique mission and functions of the CIA are reflected in special organizational and personnel requirements. In recognition of this, the Agency has been exempted from many provisions of law regarding appointments, promotions, and separation from service. These exemptions are firmly based on the following factors:

--the need for CIA to protect the confidentiality of intelligence sources and methods;

--the need for flexibility in melding personnel resources to rapidly shifting requirements of foreign relations;

--the special hazards to which intelligence officers are subject in fulfilling their duties; and

--the unique pressures, such as susceptability to "targeting" by foreign intelligence services, to which intelligence agencies and employees are subject.

2. The provisions of the Civil Service Reform legislation (H.R. 11280/ S. 2640) would:

--conflict with the statutory responsibility of the Director of Central Intelligence to protect sources and methods from unauthorized disclosure (50 U.S.C. 403(d)(3) and 403g);

--conflict with the discretionary authority of the Director of Central Intelligence to remove employees of CIA in order to protect and further the nation's foreign intelligence efforts (50 U.S.C. 403(c)); and

--hamper CIA in its staffing flexibility and requirements and would conflict with the excepted status of its personnel system under 50 U.S.C. 403j.

3. The Central Intelligence Agency, therefore, in conformity with existing statutory exemptions and authorities should be exempt from the provisions of this bill.

UNITED STATES CIVIL SERVICE COMMISSION
WASHINGTON, D.C. 20415

CHAIRMAN

May 22, 1978

T. White
X 7151

Honorable Abraham Ribicoff
Chairman, Committee on
Governmental Affairs
3308 Dirksen Senate Office Building
Washington, D.C. 20510

Dear Chairman Ribicoff:

On behalf of the President, I wish to express our appreciation to the Governmental Affairs Committee for moving responsibly and expeditiously to consider the administration's civil service reform proposals. At the initial mark-up session scheduled for this morning, my understanding is that the Committee will generally review the legislation, and then focus more specifically on Titles I and II of the bill. To aid the members, I thought it would be useful to summarize concisely some of the major issues which are likely to arise, and to explain the administration's approach to resolving them.

As you know, this is the first comprehensive reexamination of the Federal civil service system since it was created nearly a century ago. Necessarily, the proposals are complex. However, virtually all features of the program can be related to two sets of guiding objectives:

1. To increase individual performance incentives, broaden management flexibility, and cut red tape.

   -- Single-mission, single-headed Executive Branch Office of Personnel Management (OPM);

   -- Senior Executive Service and phased-in Merit Pay for managers GS-13-15;

   -- Streamlined disciplinary procedures to make inadequate performance a practical basis for demotion or dismissal;

-- Modifications in Veterans' Preference;

-- Delegation of personnel decision making authority to agencies under OPM guidance.

2. To strengthen protection of employee rights and prevent political abuse of merit principles.

-- Independent, single-mission, bipartisan Merit Systems Protection Board (MSPB);

-- Special Counsel within MSPB, with fixed term of office, to investigate and remedy political and other forms of abuse;

-- Enumeration of specific categories of merit principles and prohibited personnel practices;

-- Strict penalties for individual violators of prohibited practices;

-- Codification in law of Executive Order 11491 which now governs Federal sector labor-management relations.

As is apparent from the above summary, the proposal will be significantly enhanced by the Reorganization Plan announced by the President on March 2, which he will submit later this week. Under that Plan, the employee rights protection functions, including inquiry and adjudicatory powers, will be transferred from the existing Civil Service Commission to the MSPB; the MSPB will become an independent agency, beyond the control of the President, and will be headed by a three-member bipartisan board, in keeping with its quasi-judicial character, with overlapping terms and ineligibility for reappointment. The executive function of managing Federal personnel policy, which the CSC now discharges along with its adjudicatory duties, will be inherited by the OPM. Accordingly, it will be an Executive branch agency with a single chief.

Since I understand that today's discussion will concentrate on Titles I and II of the bill, I would like to address some of the major issues likely to arise regarding those provisions.

TITLE I--MERIT SYSTEM PRINCIPLES

One of the fundamental sources of confusion within the existing civil service system is the absence of any definitive statement of its constitutive principles and prohibited practices. Title I fills this need. It creates a new Section 2301 in Title 5 of the Code wherein eight merit system principles are prescribed--e.g., recruitment of the most qualified candidates to serve the accepted aims of Federal employment; assurance of nondiscrimination, provision of equal pay for work of equal value, protection of employees against arbitrary action, etc. The Title also specifies, in a new Section 2302 of Title 5, nine prohibited personnel practices. These prohibitions, including unlawful discrimination, political coercion, granting illegal preferences, and reprisal against "whistle-blowers," are made enforceable through the Merit Systems Protection Board and the Special Counsel under Title II.

The Administration intends that the merit principles and prohibited personnel practices, together with the enforcement apparatus prescribed by Title II, will cover virtually all entities within the Executive establishment, except for government corporations, the intelligence community, the General Accounting Office, and any other agency, unit, or position exempted by action of the President. The Administration believes that the intelligence community must have its own accountability system. Such a system has been developed over the past two years, embracing the standing intelligence committees of the Congress, the establishment of inspectors general within the Central Intelligence Agency and other agencies, and the reinforcement of the Intelligence Oversight Board in the Executive Office of the President.

(3)

TITLE II--CIVIL SERVICE FUNCTIONS: PERFORMANCE APPRAISAL; ADVERSE ACTIONS

Title II supplements the civil service Reorganization Plan by spelling out certain new functions and changes in existing functions to be discharged by OPM, MSPB, and the Special Counsel. On the basis of our discussions with Committee members and staff, and our review of the hearing record, we think it would be useful here to single out two major issues--MSPB hearing procedures following dismissal or demotion of an employee, and whistleblower protection.

A. MSPB hearing procedures: The need to make job performance a practical basis for demotion or dismissal.

The provisions in Title II proposing reforms of employee disciplinary procedures (Section 202, 203, and 204) go to the heart of the President's design for overhauling the civil service system. These new procedures have one overriding objective--to make inadequate job performance a practical basis for demotion or dismissal. Under the procedures which now exist, that simple goal has not been achieved.

To attain this goal, essential to a work environment in which productivity is conscientiously and consistently pursued, we have tried to restructure existing procedures to promote a single underlying purpose: the language of the bill should send to the MSPB and its hearing officers the strongest possible signal to uphold an agency's considered judgment that an employee's job performance has been unacceptable -- as long as that judgment is reasonable and not arbitrary; if on the same facts a reasonable person could have reached the same conclusion the agency did -- even if other reasonable persons could have reached alternative or opposite conclusions -- then the agency's action should stand. Federal managers given tremendous responsibilities by modern statutes cannot be held accountable for their performance, if they cannot hold their subordinates similarly accountable. If the language of the bill which ultimately passes the Congress does not achieve this simple aim, then a major element of reform will be lost.

The administration bill provides that an employee may not be demoted or dismissed by the agency until after he has received notice of the charges against him, an opportunity to respond orally and in writing, and a period in which to improve his performance. After the adverse action has been taken by the agency, he may appeal to the MSPB.

At the MSPB, the Board or an assigned appeals officer or Administrative Law Judge must decide the appeal on the record after a full evidentiary hearing, unless there are no material facts in dispute. Tracking the summary judgment procedure used in the Federal courts, if disputed material facts are absent from the record, the case may be decided without a full hearing. An employee dissatisfied with the decision of the appeals officer or the Administrative Law Judge may petition the Board for a review of the decision.

Criticisms of the MSPB procedures have focused upon an alleged shifting of the burden of proof to the employee and establishing a dual system for adjudicating employee discrimination complaints. With regard to the first criticism, we have recently specified that the agency carry the initial burden of making a prima facie demonstration of its case. Thereafter the employee may rebut. The appeals officer must set aside the agency action if he finds that the employee was a victim of discrimination, that the agency action, though regular on its face, was arbitrary and capricious, or that the agency committed procedural errors which substantially impaired the employee's defense.

In order to avoid any confusion regarding the discrimination question, the bill provides that the definition and review standards are identical to those found in Title VII of the Civil Rights Act of 1964, as amended, the Age Discrimination in Employment Act and the Rehabilitation Act. Finally, all MSPB adjudications involving discrimination matters may be reviewed by the Equal Employment Opportunity Commission consistent with Reorganization Plan No. 1 of 1978.

B. Whistle-blower protection: The need for strong -- but carefully defined -- safeguards.

The President's bill creates an entirely new right for Federal employees--the right to "blow the whistle" on wrongdoing by their colleagues and superiors without fear of official reprisal. This right is created in Title I, which specifies among the eight categories of prohibited personnel practices:

> "reprisal. . . for the [lawful] disclosure . . . of information concerning violations of law, rules, or regulations."

In other words, the bill makes it illegal to use any personnel action, such as a downgrading or unfavorable performance evaluation, to harm an employee for blowing the whistle on violations of laws, rules, or regulations within the bureaucracy.

This new right is backed up by potent sanctions, provided by Title II. If an agency retaliates against a whistle-blower by using a personnel action other than one which may be appealed to the MSPB, the Special Counsel may unilaterally stay that personnel action. If the agency attempts to demote or dismiss the whistle-blower, the MSPB is empowered to reverse the agency action. In addition, the Special Counsel may prosecute

individual offenders before the MSPB and seek imposition of penalties ranging from civil penalties up to $1,000, removal and debarment from Federal employment for up to five years; these potent sanctions will deter cynical officials from harassing whistle-blowers. Finally, the Special Counsel may recommend general remedial action to the agency head in question.

A number of criticisms have been leveled at the President's whistle-blower protection provisions, and alternative bills have been introduced. All of these criticisms come down, we believe, to one point: a failure in the Administration's bill to provide for revelations of bureaucratic wrongdoing which does not amount to illegality--i.e., activities which are "improper," "wasteful," or "inefficient," but not violations of laws, rules, or regulations.

In discussions with the Committee staff and some members, we have acknowledged this point, and discussed the outlines of a concept to resolve it, which we will describe below. However, we remain strongly opposed to alternative bills which have been introduced. Though well-intentioned, these proposals would severely compromise the design of the President's civil service reform program to make the bureaucracy more manageable and effective. In particular:

-- Some whistle-blower protection proposals would put the MSPB in the business of substantive oversight of agency policy and implementation--as distinguished from the mission of protecting employee rights. These measures would give the MSPB and Special Counsel broad powers to investigate and impose sanctions for correcting the alleged improper or illegal activities which a particular whistle-blower has revealed. We believe this is a job which surely should be done--but not by institutions designed to enforce rights created by the personnel system. Employee rights protection is itself a challenging mission; these new entities created by the civil service reform package should not be distracted by a very different and even more complex responsibility--substantive agency oversight. We strongly oppose turning the MSPB and its Special Counsel into a "little GAO." (1)

-- Overbroad whistle-blower protection provisions will encourage employees who anticipate demotion, dismissal or other personnel actions to stage a "leak," in order to claim the special protections afforded whistle-blowers. This prospect is a very serious concern, and the sham whistle-blower tactic has already been used in at least one major instance. The alternative bills would give poor performers tremendous new leverage to block legitimate personnel actions, simply by threatening a manager with disruption of his or her program by public attacks on it, and by forcing the manager into tedious MSPB or court litigation over the whistle-blower charges. These bills will spawn a new form of personnel litigation, which will likely prove a more insurmountable obstacle to effective managerial leadership than is the current disciplinary apparatus, which the President's bill seeks to reform.

-- Overbroad whistle-blower protection measures enhance existing incentives to use "leaks" as a bureaucratic political weapon against policies or practices with which an employee simply disagrees. Most of the alternative bills prohibit the imposition of any type of discipline when employees publicly disclose internal activities which they "reasonably believe" to be "improper." Under such formulations, essentially no internal communication to any agency official, or even the President, would be confidential, whether made in a meeting or a written memorandum. Employees could be encouraged to campaign publicly against policy decisions of which they disapprove. Even now, the practical fact is that wide latitude exists to use this avenue to frustrate the implementation of legitimate policies, especially innovations potentially threatening to major interest groups or other powerful opponents.

The Administration believes that the gap in its original whistle-blower protection proposal can be filled, without exacerbating the problems sketched above. Our proposal is to assure that employees be guaranteed the right to safely and confidentially report wasteful, inefficient, or improper activities to an entity which has the independence and the capability to investigate, apply remedies, and report to Congress and the public. The best vehicle for accomplishing this purpose is the Inspector General concept developed by the Governmental Affairs Committee. Two major departments--HEW and DOE--have inspectors general; a number of others would receive them under the pending bill recently passed by the House and now pending before the Committee. We believe that the Inspector General concept is well suited to providing an effective check on wasteful and improper activities within agencies, and a channel for communicating such wrong-doing to Congress.

(2)

We would support amendments to the Inspector General legislation, if necessary, and to the civil service reform legislation to assure that communications by employees with the Inspector General are securely protected against reprisal.

In conclusion, we wish once again to thank you and the other members of the Committee for your consideration of the major public issues addressed by the President's civil service reform proposals. We are eager to provide the Committee and its staff with more detailed information regarding the two crucial questions discussed in this letter, as well as on other issues raised by Titles I and II, and the remainder of the package.

I would appreciate it if you could share this letter with your colleagues on the Committee.

Sincerely,

Alan K. Campbell

Alan K. Campbell
Chairman

WHISTLE-BLOWING LEGISLATION AND THE NEED FOR SPECIAL CHANNELS FOR INTELLIGENCE AGENCIES

A. Objections to the Federal Employee Protection Act of 1978 (S. 3108), and Recommendations

A particularly objectionable situation could result from the factors outlined in "B" below since the Director of Central Intelligence could be forced to retain an employee on a particularly sensitive national security project, thereby endangering the success of the mission itself, merely because, in the eyes of the proposed Special Counsel, the employee on his own raised a colorably legitimate complaint that the project was improper, illegal or merely "wasteful."

National security and intelligence matters generally, and possible intelligence agency improprieties in particular, are sufficiently different from other Government matters to warrant special treatment. This situation is reflected, for example, in S. Res. 400 and H. Res. 658, establishing, respectively, the Senate and House oversight committees. Legislation in this area should reflect that whistle-blowing procedures applicable to intelligence agencies and employees should be kept in separate channels, not merely that there be special procedures for handling the information while applying the same whistle-blowing procedures as for all other Government employees (the Humphrey-Leahy legislation does this). A 22 May 1978 letter from Civil Service Chairman Campbell to Chairman Ribicoff reflects the view that the Administration supports keeping intelligence employee whistle-blowing in separate channels (see Tab B; particularly page 3 thereof).

Although we support the position outlined in the preceding paragraph, we believe that the Agency should not, at this time, propose specific alternative whistle-blowing procedures for intelligence employees. This matter is an issue in the intelligence charter legislation (S. 2525/ H.R. 11245); as yet, there is no consensus as to its resolution (e.g., whether the IOB mechanism should be codified in statute or left to Executive Order procedures). The charter legislation process, addressing as it will the wide variety of intelligence authorities, requirements and procedures, is the proper place to determine what whistle-blowing procedures should apply to intelligence employees. It is premature to discuss specific resolution of this matter in a vacuum at this time.

B. Provisions of the Federal Employee Protection Act of 1978 (S. 3108)

1. Merit System Protection Board (Merit Board)

--Five members appointed by the President, with advice of the Senate. Three may be members of the same political party; none may hold another office or position in the U.S. Government. Must have security clearances. Can only serve for one five-year term.

--Members and their designees have subpoena powers.

--Must submit annual report to the Congress of its activities, including a list of names of employees on whom penalties under this act have been imposed.

2. Special Counsel

--Must be an attorney; must have security clearances; appointed by the President, with advice and consent of the Senate. Serves for only one five-year term.

--Has all powers to carry out the provisions of the Act.

3. Disciplinary action may not be taken against an employee who discloses classified information concerning activities which the employee believes are illegal, provided he reveals such information to the Congress, the proposed Merit Board, the proposed office of Special Counsel, the U.S. Courts, any agency or any other employees. Only if the employee discloses classified information to "the public" could adverse action be taken.

--Upon receipt of the allegation, the Special Counsel must conduct an investigation within 15 days. If he decides not to proceed, this decision may be appealed to the Merit Board. The Special Counsel may also freeze any adverse personnel action taken against a complaining employee. Allegations which appear to have merit are referred to the appropriate agency head who must complete his investigation within 30 days; he does have a 15-day grace period. A representative of the Special Counsel will monitor the investigation and the Special Counsel is empowered to institute his own which would determine, apparently, whether the information on which the "whistle was blown" in fact concerned an illegal or improper activity.

--Only the portions of hearings or proceedings involving classified information will be closed to the public. All transcripts will be protected and unavailable to the public.

--Persons involved with the hearings who do not have security clearances, nonetheless, will have access to all information under the supervision and direction of the Special Counsel. They will be allowed to attend all the hearings and proceedings and take part in the investigation.

--The Special Counsel may appoint any person to look at classified information and attend all hearings, proceedings, or investigations.

--The Special Counsel has power to order corrective personnel actions, including reinstatement, removal, payments or damages.

--The Special Counsel may institute disciplinary proceedings against an employee who has taken, or attempted to take, an adverse personnel action against a complaining employee or who has engaged in, or attempted to engage in, an illegal or improper activity.

4. Appeals

--Any aggrieved employee or agency may appeal Special Counsel decisions to the Merit System Protection Board and then to the Courts.

5. Miscellaneous

--The Court will award attorney's fees and costs.

--The Court will also furnish employees with representation regardless of cost.

--U.S. Government may recover from any employee who committed a willful and knowing violation under this bill damages, fees and costs.

C. For comparison, the following are the salient provisions concerning whistle-blowing in the Civil Service Bill itself:

--Grants subpoena power to Special Counsel, proposed Merit Board and other designated personnel.

--The Special Counsel can freeze any personnel action having substantial economic impact on complaining employee until the investigation is over.

--The Special Counsel can require an agency head to take corrective action.

--If no corrective action is taken, the Special Counsel could institute disciplinary proceedings against an employee who failed to implement corrective action.

--The Special Counsel will maintain a public list of violations of law or regulation referred to an agency head, along with a certification of actions taken thereon.